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IN THE

SUPREME COURT OF THE UNITED STATES

No. 620

OCTOBER TERM, 1963

BOEING AIRPLANE COMPANY,
Petitioner,

vs.

ARTHUR E. PERRY, As Special Administrator of the Estate of James W. Sullivan, Deceased; and COLENE SULLIVAN, As Widow of James W. Sullivan, Deceased; and CYNTHIA LYNN SULLIVAN, a Minor, by and Through Colene Sullivan, Her Mother, As Natural Guardian and Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In Holding That a Special Administrator Appointed Pursuant to a Nebraska Statute Could Prosecute a Cause of Action Assigned to the United States by the Person for Whose Exclusive Benefit the Special Administrator Acts, the Court Below Ignored the Supremacy Clause of the United States Constitution, Emasculated the Pertinent Federal Statute, 5 U.S.C. 776, and Violated the Basic Principle That Litigation Must Be Prosecuted by the One Who under the Substantive Law Owns the Cause of Action. The Federal Statute Providing for Assignment of Causes of Action by Those Covered under the Federal Employees' Compensation Act Envisions a Uniform Federal Policy, Which Is Completely Thwarted by the Decision Below. Such Federal Statute Has Not Been, but Should be, Construed and Upheld by This Court. The Decision Below Conflicts in Principle with All Decisions Construing 5 U.S.C. 776 9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Boeing Airplane Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on September 16, 1963 (Appendix A, p. A1). The

judgment affirmed a ruling of the United States District Court for the District of Kansas in favor of Respondents (the plaintiffs in the District Court) but which ruling included a finding that its order involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. An appeal was allowed by the court below pursuant to 28 *U.S.C.* 1292(b). The Court of Appeals remanded the case for further proceedings.

The litigation involves an action brought by a Nebraska special administrator for the exclusive benefit of a widow whose husband was killed while flying as a member of the United States Air Force a B-47 aircraft manufactured by Petitioner. The widow obtained compensation from the United States and pursuant to 5 *U.S.C.* 776 and at the request of the United States, assigned to the United States all of her right, title and interest in and to any claim for damages against Petitioner, Boeing Airplane Company, together with all rights of action thereunder. Both the District Court and the Court of Appeals allowed the proceeding to continue as brought by the Nebraska special administrator (for the exclusive benefit of the widow) without requiring the United States to whom the cause of action had been assigned, to be added or substituted as a party.

OPINIONS BELOW

The District Court's Memorandum of Opinion and order* (Appendix B, p. A6) is not reported. The opinion

*Reproduced Record in Court of Appeals, Memorandum of Opinion, p. 8, Order, p. 11.

of the Court of Appeals** for the Tenth Circuit, entered September, 16, 1963 (Appendix A, p. A1) is reported in 322 F.2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered September 16, 1963,** (Appendix A, p. A1). A Petition for Rehearing was filed October 7, 1963 (R. 5). On October 16, 1963, the Court of Appeals denied the Petition for Rehearing (R. 6). The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* 1254(1).

QUESTION PRESENTED

The question presented is whether a Nebraska special administrator appointed, pursuant to a Nebraska statute, to pursue a cause of action for the exclusive benefit of a widow can, after filing such cause of action, continue to prosecute the cause when the widow, for whose exclusive benefit the cause of action exists, in consideration of benefits paid by the United States, has assigned pursuant to 5 *U.S.C.* 776 at the request of the United States all her right, title and interest in and to such cause of action to the United States—under the decision of the District Court and the court below, the action can continue with the special administrator as plaintiff, even though the United States has not intervened or been substituted as the sole owner of such cause of action, or, stated differently: Whether the decision of the court below in a case of first impression involving a novel and important question is so inconsistent with the purpose and the theory envisioned

**Certified Record, Opinion, p. 3; Judgment, p. 4.

by the Congress as to leave the intent and meaning of a provision of the Federal Employees' Compensation Act, 5 *U.S.C.* 776 in such a state of confusion as to require reversal and modification by this court.

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

United States Constitution, Article VI, Clause 2, Supreme Law of Land.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"5 U.S.C. 776. Subrogation of United States to employee's right of action; assignment by employee; disposition of moneys collected from person liable

"If an injury or death for which compensation is payable under sections 751-756, 757-781, 783-791 and 793 of this title is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary may require said beneficiary to prosecute said action in his own name. Any employee who is required to appear as a party or witness in the prosecution of said action is, while so engaged, in an active duty status.

"If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under sections 751-756, 757-781, 783-791 and 793 of this title.

"The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury. As amended Sept. 13, 1960, Pub. L. 86-767, Title II, Sec. 207, 74 Stat. 908."

STATE STATUTE INVOLVED

"Revised Statutes of Nebraska, 1943, Section 30-809

"Action for wrongful death; creation. Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Revised Statutes of Nebraska, 1943, Section 30-810

"Action for wrongful death; limitation; in whose name brought; judgment; disposition of avails; compromise of claim; procedure. Every such action, as described in section 30-809, shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons. A personal representative shall not compromise or settle a claim for damages hereunder until the court by which he was appointed shall first have consented to and approved the terms thereof. The amount so received in settlement, or recovered by judgment, shall be reported to and paid into such court for distribution, subject to the order of such court, to the persons entitled thereto after a hearing thereon and after notice of such hearing and of the time and place thereof has been given to all persons interested by publication three successive weeks in a legal newspaper published within the county or, if no legal newspaper is published within the county, then in a legal newspaper published in an adjoining county; Provided, such amount shall not be subject to any claims against the estate of such decedent."

STATEMENT

Respondents (plaintiffs below) filed a complaint for wrongful death on March 27, 1958. Actually one plaintiff,

Arthur E. Perry, filed the action as special administrator of the estate of James W. Sullivan, deceased. Another plaintiff, Colene Sullivan, joined in the action as the widow of Mr. Sullivan. The last plaintiff joined in the action as the daughter of Mr. Sullivan. Jurisdiction was based on diversity of citizenship with the requisite amount in controversy. The suit was brought pursuant to a Nebraska statute for the exclusive benefit of the widow and next of kin of James W. Sullivan. Mr. Sullivan was killed while flying as a Captain in the United States Air Force a B-47 aircraft manufactured by Petitioner. His flight was for the Air Force under Air Force orders.

Plaintiffs asserted a right to recover from Petitioner due to negligent acts designated as failure to exercise due care in the designing, manufacturing, fabricating, inspecting and servicing of the B-47 aircraft and delivering to the United States a defective and unairworthy aircraft (R. 2-5).

The widow sought compensation from the United States under the Federal Employees' Compensation Act, 5 *U.S.C.* 776. Pursuant thereto she was paid at the time of assignment of the cause of action over $20,000.00 by the United States and the United States was committed to pay her over a period of the next 13 years additional sums aggregating approximately $80,000.00. As a result of such payments and pursuant to 5 *U.S.C.* 776, the United States asked for and obtained on April 15, 1958, an assignment from Mrs. Sullivan as widow of James W. Sullivan and as parent of Cynthia L. Sullivan and Dennis L. Sullivan (the assignment (R. 7) made in consideration of the payments received and to be received from the United States) reciting that the widow did

> "* * * sell, assign, transfer and set over to the United States of America all my right, title, and in-

terest in and to my claim for damages against Boeing Airplane Company * * * together with all rights of action thereunder."

Petitioner ascertained in 1960 that the assignment had been made and filed an affidavit, attaching such assignment thereto, and moved for summary judgment (R. 5-6).

The District Court determined on August 7, 1962, that the action could continue without the intervention or substitution of the United States. The District Court's order (R. 11) was dated September 10, 1962. It further recited:

> "The Court further finds and is of the opinion that the instant order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Thereafter Petitioner sought and obtained from the Court of Appeals permission to appeal pursuant to 28 *U.S.C.* 1292(b). The Court of Appeals, after hearing, determined on September 16, 1963, that the District Court properly overruled the motion for summary judgment and that the matter should be remanded for further proceedings. A petition for rehearing was duly filed and overruled by the Court of Appeals on October 16, 1963.

REASONS FOR GRANTING THE WRIT

In Holding That a Special Administrator Appointed Pursuant to a Nebraska Statute Could Prosecute a Cause of Action Assigned to the United States by the Person for Whose Exclusive Benefit the Special Administrator Acts, the Court Below Ignored the Supremacy Clause of the United States Constitution, Emasculated the Pertinent Federal Statute, 5 U.S.C. 776, and Violated the Basic Principle That Litigation Must Be Prosecuted by the One Who under the Substantive Law Owns the Cause of Action. The Federal Statute Providing for Assignment of Causes of Action by Those Covered under the Federal Employees' Compensation Act Envisions a Uniform Federal Policy, Which Is Completely Thwarted by the Decision Below. Such Federal Statute Has Not Been, But Should Be, Construed and Upheld by This Court. The Decision Below Conflicts in Principle with All Other Decisions Construing 5 U.S.C. 776.

The court below brushed aside consideration of the Federal Statute, 5 *U.S.C.* 776, stating, "The statutory assignment had no effect whatsoever upon the exclusive right of the Nebraska Administrator to bring and maintain the suit * * * Since the Administrator is the real party in interest * * *" the suit is properly maintainable by such administrator without the United States being a party. This is the whole opinion upon the point. The decision of the court below in so brushing aside the pertinent Federal statute 5 *U.S.C.* 776, is so inconsistent with the theory and purpose thereof as to leave the intent and meaning of such Congressional enactment in a state of confusion. This Court should speak to bring clarity from chaos.

The cause of action for wrongful death asserted against Petitioner was brought by a Nebraska special administrator

acting for the exclusive benefit of the widow and next of kin of one James W. Sullivan. After the institution of such action, the widow and next of kin, at the request of the United States and in consideration of payments made and to be made by the United States aggregating approximately $100,000.00, assigned to the United States all of her right, title and interest in and to any cause of action against Petitioner. The cause of action asserted was one for wrongful death and arose under a Nebraska statute. The court below determined that the Nebraska statute was the sole statute involved and that the special administrator envisioned thereby was the only person who could bring and control the litigation. It determined that the rights of the United States were only the widow's rights and that it could not acquire any different status than as a beneficiary of the cause of action asserted under a Nebraska statute by the special administrator.

Such decision of the court below ran afoul of the Supremacy Clause of the United States Constitution and completely emasculated the pertinent Federal statute, 5 *U.S.C.* 776. This is a case of first impression. The problem presented is the construction of an important Federal statute and involves a novel and important question.

The Supremacy Clause of the *United States Constitution*, Article VI, Clause 2, has as its obvious purpose a resolvement of any conflicts between Federal and State law, in favor of course of the Federal provision so that in all matters covered by the Federal Constitution the law would be uniform throughout these United States—despite any particular statute of any state. Thereunder this Court has repeatedly held that where a conflict arises the state statute must yield and the Federal statute must prevail. Such is the direct holding of this Court in *Maynard* v. *Durham & Southern R. Co.*, 365 U.S. 160,

5 L. Ed. 2d 486 (1961). For a more recent pronouncement to the same effect see *Sperry* v. *Florida*, 373 U.S. 379, 10 L. Ed. 2d 428 (1963), and *Free* v. *Bland*, 369 U.S. 663, 8 L. Ed. 2d 180 (1962).

All of our states have enacted statutes changing the common law and providing for the survival of an action for wrongful death. The instant litigation is brought pursuant to one of such statutes in Nebraska. The cause of action that survives by Nebraska statute is one for the exclusive benefit of the widow and next of kin. It sounds in tort and is not assignable under the state law. The special administrator can proceed only for the exclusive benefit of the widow and next of kin. The decisions below would have such administrator proceed for the benefit of the United States contrary to the Nebraska statute and the applicable Federal statute.

The Congress in its wisdom enacted Section 776 of 5 *U.S.C.* as a part of the Federal Employees' Compensation Act. It was enacted to give the United States the right, where it was paying compensation, to obtain by assignment any right of action the beneficiary of the bounty of the United States had against any third party. The Act itself and its legislative history (See Vol. 53 of the *Congressional Record*, History of H.R. 15316, Appendix C p. A11), make it clear that the Congress understood that the tort it was considering, the action for wrongful death, was not assignable under the state law and that it, by enacting 5 *U.S.C.* 776 was superseding the state law and providing for the protection of the United States. Its plan was simple: The beneficiary of such a wrongful death action could either proceed against the third party tortfeasor or could obtain compensation from the United States. If such beneficiary obtained compensation from the United States, the United States could require an assign-

ment of the cause of action from such beneficiary which would place the full power in the hands of the United States to either proceed with, settle, or ignore the cause of action for wrongful death. The duty of the United States as envisioned by the Congress, once such an assignment was requested and obtained, was to prosecute, to ignore, or to compromise the cause of action, as the United States saw fit, and to account to the beneficiary if, and only if, the United States asserted and recovered in such wrongful death action an amount greater than the compensation payable under the Federal Employees' Compensation Act by the United States to such beneficiary.

This Congressional enactment has been recognized by several of our Courts of Appeals. In the 6th Circuit it was determined in *Louisville & Nashville R. R. Co.* v. *Rochelle*, 252 F.2d 730 (1958), that the United States could have required the beneficiary to assign the cause of action to the United States but without such an assignment the United States had no right to bring the action and was not a proper party in the beneficiary's action for wrongful death, despite its first right to the proceeds. This is the uniform holding of the Courts of Appeals (prior to the decision of the court below) as note *United States* v. *Klein*, 153 F.2d 55, 8th Circuit (1946), and note in accord state court cases, *Cox* v. *Detroit United Ry.*, 238 Mich. 527, 213 N.W. 710 (1927); *Chiles* v. *Rohl*, 47 S.D. 580, 201 N.W. 154 (1924); *Drake* v. *New York State Electric & Gas Corp.*, 294 N.Y.S. 227 (1937); *Wood* v. *Ford Garage Co.*, 293 N.Y.S. 999 (1937), affirmed 300 N.Y.S. 1358 (1937); *Lassell* v. *City of Gloversville*, 217 N.Y.S. 128 (1926); *Morgan* v. *Woodruff*, 208 S.W.2d 628 (Tex. Civ. App.) (1948); *Wagner* v. *City of Duluth*, 211 Minn. 252, 300 N.W. 820 (1941); *Cary* v. *Burris*, 169 Ore. 24, 127 P.2d 126 (1942); *Oklahoma City*

v. *Caple*, 187 Okla. 600, 105 P.2d 209 (1940); *Dempster Mill Mfg. Co.* v. *Wiley*, 131 S.W.2d 257 (Tex. Civ. App.) (1939).*

The right of the United States to proceed as the plaintiff after assignment has been recognized by the 2d Circuit as note *United States* v. *New York Foreign Trade Zone Operators*, 304 F.2d 792 (1962).

The matter has not reached this Court. In all the courts where the problem has been determined a basic principle is enunciated: Prior to assignment by the beneficiary to the United States, the United States does not own a cause of action; can not assert the cause of action created by the state statute and is not even a proper party to such a cause of action maintained by the beneficiary. We submit that the corollary to such principle should be just as uniformly recognized: Once the United States pays compensation and asks for and obtains an assignment of the cause of action from the beneficiary, the United States does own the cause of action and is the only person who can prosecute and maintain such cause of action, albeit established under the state law but assigned to the United States pursuant to the Federal law, 5 *U.S.C.* 776.

The intent and purpose of the Congressional enactment is obvious. It was passed to enable the United States to protect its own interests and, after payment of compensation to a beneficiary covered under the Federal Employees' Compensation Act, to obtain an assignment of whatever cause of action existed under state law and to maintain,

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*In some of these cases, assignment by the beneficiary of amounts paid by the United States, out of proceeds to be recovered, is held not to be a statutory assignment of the cause of action. Such non-statutory assignment does not give the United States the right to join the action, *e. g.*, *Dempster Mill Mfg. Co.* v. *Wiley*, 131 S.W.2d 257 (Tex. Civ. App.) (1939). The instant assignment is a statutory assignment by its own terms.

prosecute, settle or ignore such cause of action in whatever manner the United States determined it should act, without interference, suggestion or bother from any other person, be it a special administrator, beneficiary or anyone else. The sole duty of the United States, after the assignment by such beneficiary, as clearly enunciated by the Congress is one of accounting to such beneficiary in the event, and only in the event, that the United States in the cause of action it determines to assert recovers more than the amount of compensation payable by it to such beneficiary, plus the expense of such realization or collection.

This litigation presents a simple problem. The United States owns the cause of action. As the owner it alone must maintain the cause of action. The court below in not recognizing the United States as the owner of such cause of action made the Nebraska statute superior to the Federal statute. In so doing it clearly erred and should be straightened out by this Court. The basic principle involved is the supremacy of the Federal law under the Federal Constitution. The matter is only an application of the principle uniformly recognized in our Federal system of jurisprudence as note 2 *Barron & Holtzoff, Federal Practice and Procedure*, Sec. 482, pp. 7-9

> "* * * Most authorities agree that the 'real party in interest' is the party who, by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery * * *"

Under the Federal statute, 5 *U.S.C.* 776, the United States is the party which by the substantive law and Federal statute possesses the right sought to be enforced. The Nebraska statute created the cause of action. Under the Federal statute such cause was assigned to the United

States. Thereafter the United States and it alone could assert such cause. The court below clearly erred in determining that the litigation could proceed in the absence of substitution or intervention by the United States. There is a compelling need in this situation for this court to speak and speak firmly to maintain the supremacy of the Federal law and to achieve the uniformity envisioned by the Congress of these United States.

Respectfully submitted,

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APPENDIX A

MURRAH, Chief Judge.

This is an interlocutory appeal, under 28 U.S.C., §1292, from an Order denying Boeing Airplane Company's motion for summary judgment in a wrongful death action, based on the contention that the Administrator-plaintiff is no longer the real party in interest, under F.R.C.P., Rule 17(a).

The contention is founded on these facts. A Nebraska Administrator brought this diversity suit in the Kansas District Court for the wrongful death of his decedent in Nebraska. When the suit was commenced, the widow and minor child, for whose benefit it was brought, were receiving and continue to receive payments under the Federal Employees Compensation Act, 5 U.S.C., §751, 39 Stat. 742. After commencement of the suit, the United States Employees Compensation Commission exacted an "agreement" from the widow, pursuant to §26 of the Act. This section provides in material part that "* * * if an injury or death for which compensation is payable * * * is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Commission may require the beneficiary to assign to the United States any right of action which he may have to enforce such liability * * *, or the Commission may require said beneficiary to prosecute said action in his own name * * *." The agreement recited the substance of the statute, and then provided that, in consideration of the payments made under the Federal Employees Compensation Act on account of the death of James Warner Sullivan in Nebraska, while employed as

a Captain, USAF Reserve, the widow assigned, transferred, and set over to the United States all of her "right, title and interest in and to her claim for damages against Boeing Airplane Company * * * together with all rights of action thereunder." After the execution of this agreement, Boeing moved for summary judgment, contending in the trial court, as it does here, that the assignment by the widow on behalf of herself and her minor child, pursuant to the statute, precluded the Administrator from maintaining this action as the real party in interest.

Every civil action in the federal courts must, of course, be prosecuted in the name of the real party in interest. And, the "real party in interest" is the one who, under applicable substantive law, has the legal right to bring the suit. See: Hoeppner Construction Company v. United States, 287 F.2d 108. Accordingly, an Administrator may bring the suit in his own name without joining the parties for whose benefit it is brought, if by the law of the forum he may do so. See: F.R.C.P., Rule 17(a); third sentence, Rule 17(b); Federal Practice and Procedure, Barron & Holtzoff, Ch. 8, §486; and Moore's Federal Practice, Vol. 3, §17.18.

Kansas, the forum of this action, authorizes the Nebraska Administrator to bring this wrongful death action, if the Administrator could have maintained it under the law of Nebraska. See: Kansas G.S., 60-143; Russell v. Railway Co., 189 P. 367; and Williams v. Bridge and Iron Co., 206 P. 327. And see generally, Annot., 52 A.L.R.2d 1016. Under the law of Nebraska, where this right of action was created and arose, only the Administrator has the legal right to bring the action, "* * * for the exclusive benefit of the widow * * * and next of kin." Sec. 30-810, R.S. Nebraska, 1956. See: Russell v. New Amsterdam Casualty Company, 303 F.2d 674, citing Swift

v. Sarpy County, 167 N.W. 458; Lucky v. Union Pac. R. Co., 219 N.W. 802; and Goeres v. Goeres, 248 N.W. 75. In this diversity suit to enforce a state created right of action, the federal court, sitting as another state forum, enforces such right in accordance with applicable state law. See: Guaranty Trust Co. v. York, 326 U.S. 99.

Boeing concedes that absent the statutory assignment, the United States has no litigable interest in the suit and is, therefore, not a proper party to it. See: United States v. Klein, 153 F.2d 55; and Louisville & Nashville Railroad Co. v. Rochelle, 252 F.2d 730. It is thus clear that the Nebraska Administrator was and is the real party in interest, and the only person with the legal right to bring and maintain this suit; unless as Boeing contends, the widow's assignment of her right in the action, pursuant to federal statute, operated not only to transfer her beneficial interest in the right of action, but to subrogate the United States to the Administrator's right of action and supersede him, as the real party in interest.

If, of course, the assignment statute is designed to create or condition a federal right of action, any irreconcilable conflict resulting from incidence of state law must be resolved in favor of the supremacy of federal law. See: Free v. Bland, 369 U.S. 663; Braunstein v. Commissioner, 305 F.2d 949; and Case v. Bowles, 327 U.S. 92. But, this federal statute does not purport to create any right of action, or to provide a mode for enforcement of the state created right of action. The state has not only created the asserted right, but has designated the only person who may enforce it. Under the law of Nebraska, the designated Administrator is vested with the exclusive right to bring and control the litigation. See: Lucky v. Union Pac. R. Co., supra. By the assignment, the United States succeeded to the interest of the widow in the state created

right of action, i.e., it stands in the widow's shoes. And, it cannot acquire a greater right or different status than the widow-beneficiary and assignor.

The widow and next of kin were joined as parties plaintiff, but no one contends that they were authorized to bring this suit, or that they are necessary parties. While they are, to be sure, beneficiaries of the asserted right of action and entitled to the fruits of it, they had no right, under the controlling law of Nebraska, to bring, maintain or control the suit for enforcement of that right, in any court—State or Federal—and they, therefore, could not assign such right to the United States or anyone else. The statutory assignment had no effect whatsoever upon the exclusive right of the Nebraska Administrator to bring and maintain the suit. In these circumstances, we have no occasion to consider whether, under Rule 25(c), the action may be continued by them as original parties. The provision of the assignment statute, to the effect that the "* * * commission may require said beneficiary to prosecute said action in his own name," is likewise inapplicable. Since the Administrator is the real party in interest, we have no need to consider whether, under Rule 25(c), the action may be continued in the name of the Administrator after transfer of the widow's interest to the United States.

United States v. New York Foreign Trade Zone Operations, 304 F.2d 792, did recognize the right of the government to prosecute a suit against a third party, as assignee under §26, but there was no question of the right of the United States to do so, under the law of the state which created the right. Boeing also analogizes our case to the automatic assignment of "* * * all right of the person entitled to compensation to recover damages against such third person," under §33(b) of the Longshoremen's

And Harbor Workers' Compensation Act. But, no case is cited and we have found none interpreting this section of that Act to authorize the United States to sue in its own name, as assignee, when the law of the state wherein the right accrues specifically designates the only party authorized to bring the suit. We have no occasion to consider whether, as assignee before commencement of the suit, the United States could have brought it, contrary to the exclusionary provisions of the Nebraska statute. It is sufficient for the purposes of our case that the assignment was made after the suit was filed and, indeed, the United States does not assert the right to maintain it here.

The Order of the lower Court, denying the defendant's motion for summary judgment, is AFFIRMED, and the case is remanded for further proceedings.

APPENDIX B

Memorandum of Opinion

10] This is an action for wrongful death. The case is presently before the court upon defendant's motion for summary judgment.

The action was instituted by the widow, child and special administrator of James W. Sullivan for the recovery of damages ensuing from the death of James W. Sullivan allegedly caused by the wrongful act of the defendant.

The case is one of those which did not exist at common law and exists solely by virtue of statute. The Revised Statutes of Nebraska, 30-810, requires that the action shall be commenced within two years after the death of such person. This was done. James W. Sullivan died April 6, 1956, and the action was commenced on March 27, 1958. The Nebraska wrongful death statutes contain no maximum limits for recovery.

The widow of the deceased was receiving compensation under the Federal Employee's Compensation Act prior to the commencement of this action. More than two years after the injuries were sustained by the deceased, the widow was required by the Bureau of Employee Compensation of the United States to execute an assignment, designated an "agreement", which purported to sell, assign, transfer and set over to the United States of America all of the widow's right to claim for damages against Boeing and against any other parties other than the United States who may be legally liable to pay damages for said injury, together with all rights of action thereunder.

11] The defendant's motion for summary judgment is predicated on the proposition that the assignment transferred the cause of action now being prosecuted by the plaintiffs to the United States and that plaintiffs are therefore not real parties *and* interest.

The parties are apparently in agreement on four propositions. These are:

1. The action is governed exclusively by the Federal Employee's Compensation Act, 5 USCA 776, et sequentia.

2. Rule 17 (a) of the Federal Rules of Civil Procedure relating to assignment of claims has no application to cases of this type. (See United States v. Aetna Casualty, 338 US 366; 94 L. Ed. 171).

3. The widow of the deceased did on April 15, 1958, assign her claim against the defendant to the United States Government for the amounts expended by the Government under the Act.

4. The United States Government through the Department of Justice, did, on December 8, 1959 tell the plaintiffs to proceed with the prosecution of this action against the defendants.

Without quoting the pertinent portions of the statutes, 5 USCA 776 et sequentia, we agree that the statute provides:

1. The United States may require the beneficiary to assign to it any right of action he may have to enforce such liability against the third person; or

2. The United States may require such beneficiary to prosecute such action in his own name.

12] 3. The beneficiary who refuses to do what the Government directs that is assign the claim or prosecute

the action will lose his right to any compensation benefits under the Act.

The provision of the statute and the Code of Federal Regulations, 20 CRF ¶ 3.1, 3.2, 3.3 and 3.6, does not in our opinion bear out the contention of the defendant, to-wit: That the agreement of the widow to assign her cause of action to the United States had the effect of transfering the exclusive right to maintain the action from the widow to the United States. Indeed the contrary would appear to be the reasonable construction of the statute and regulations. The widow who received compensation from the United States was placed in a precarious position.

First, if she had not brought her action within the two year period provided by the Nebraska law she would be barred from future recovery under the Nebraska wrongful death statute.

Second, if she had not taken the step of protecting the Government by instituting the action against the defendant as a person having a legal liability other than the United States she would have had no rights to assign to the United States.

Third, the assignment was of a pending action and the United States retains control over it and may require the beneficiary to settle or compromise the claim which has been filed.

Fourth, if she had not brought the action within the statutory period and made the assignment she may have forfeited her rights for compensation from the United States Government.

The United States has in effect caused the plaintiffs to bring the action, caused them to assign the action to it, and is in position to control its outcome. While it is not

a party to the action, the United States has an interest in its outcome.

13] While the plaintiff and beneficiary, Colene C. Sullivan, executed an Agreement assigning her claim for damages to the United States, this assignment was made subject to the law in effect at the time it was made.

The statute, 5 USCA 776, and regulations 20 CER § 3.1, 3.2, 3.3 and 3.6 must be construed in light of the present record. We have found no cases nor have we been cited to any which are applicable in this instance. We would interrupt the statute and regulations to carry out their obvious purpose to protect both the employee's rights of action and the right of the United States to be subrogated to those rights.

Under the condition of the record before us at the present time the sustaining of a motion for summary judgment as requested by the defendant might well cause the widow to lose her right to compensation which she is presently receiving or place upon her an undue burden of sustaining her position as a beneficiary under the Federal Employee's Compensation Act.

It is our opinion therefore that under the facts and applicable law and regulations the plaintiffs are the real parties in interest and that the defendant's motion for summary judgment should be denied.

Prevailing parties will prepare and submit an appropriate order.

At Wichita, Kansas this 7th day of August, 1962.

Wesley E. Brown
Judge

Filed August 7, 1962

14] **Order**

Now on this 27 day of April 1962, the above entitled action comes on for hearing on defendant's motion for summary judgment, plaintiffs appearing by and through their attorney, William C. Farmer, and defendant appearing by and through their attorneys, Foulston, Siefkin, Powers, Smith & Eberhardt.

Thereafter, after duly considering the arguments, the Court finds that the motion for summary judgment should be overruled.

The Court further finds and is of the opinion that the instant order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It Is Therefore Ordered that defendant's motion for summary judgment should be, and it is hereby, overruled.

15] Dated: September 10, 1962

Wesley E. Brown
District Judge

Approved:

William C. Farmer
Smith, Shay, Farmer & Wetta

William C. Farmer,
One of Plaintiffs' Attorneys

Foulston, Siefkin, Powers, Smith & Eberhardt

Gerald Sawatzky
One of Defendant's Attorneys

Filed September 10, 1962

APPENDIX C

Volume 53 of Congressional Record

History of H. R. 15316

May 11, 1916—Bill & Report No. 678 referred to Committee on Whole House 7839

June 30, 1916—Committee of the Whole House on the State of the Union—debate 10312-10317

July 12, 1916—Further debate 10885-10916

P. 10909: Mr. Barkley:

". . . The bill which has been presented by the committee has one or two features in it that I think ought to be changed. For instance, there is a provision in sections 26 and 27 that where an injury is brought about on account of circumstances that would make some third person liable in damages for the injury, in that case the Government has the right to require the injured employee to assign his right of action against the corporation or individual over to the Government or to prosecute it in his own name. Whether he prosecutes it in his own name, or whether the commission prosecutes it in his behalf, and a recovery is had, then the commission has the right to apply such of the amount recovered as may be necessary to reimburse the Government for what compensation it may have paid him up to that time and apply the balance of it, if any is left over, to any future compensation that the Government might be called upon to pay to the employee. "

P. 10910: Mr. Barkley:

". . . Now in the language of this bill, this would apply to any injury he might receive at any time in the future. If he was injured today by reason of the

negligence of anybody else, and he recovered, or the commission recovered for him, I think there ought to be taken out of the amount recovered by him . . ." . . ., etc.

P. 10912: Mr. Borland:

"Mr. Chairman, I notice that this section requires the beneficiary, or gives the commission the power to require the beneficiary, to assign to the United States any right of action he may have to enforce such liability for damages by reason of death or injury. I assume, as a matter of law, that they can only require that assignment as the alternative of receiving the money."

Mr. Gard:

"That is true."

Mr. Borland:

"They could not require the assignment of the right to pursue the damages against somebody else if that right were more valuable than the right to claim the damages for compensation from the Federal Government?"

Mr. Gard:

"That is true."

Mr. Borland:

"And so in the case of my own State, where the Campbell Act gives a penalty of $5,000 for negligence and death, if the party preferred to retain that right of action he could do so?"

Mr. Gard (Chairman of Committee):

"They have the right to take the compensation or pursue their own independent remedy for damages."

P. 10912: Mr. Van Dyke:

"Mr. Chairman, I should like to ask the gentleman a question. Who is authorized to bring suit in case of an accident to a Government employee? Do the commission handle all suits?"

Mr. Gard:

"Only on assignment. The man may bring suit himself. He has an independent right to bring it. In the event that he desires, the commission may bring it under assignment by him. Otherwise there would be no right in the commission or anyone else to bring suit."

Mr. Van Dyke:

"The only point I wanted to bring out was whether the commission . . . will have authority either to bring suit or to settle all claims?"

Mr. Gard:

"Only if the man injured wants to come within the compensation law."

Mr. Van Dyke:

"If he elects to come within the provisions of the compensation law, then he has to relinquish all right he may have to bring suit to recover, and this puts in the hands of one commission the authority to bring suits against every railroad company in the country and to handle all suits?"

Mr. Gard:

"It is just a matter of assignment. He would assign to the commission the claim for damages, and they would proceed to collect it according to law."

Mr. Van Dyke:

"Of course, I can not admit that such an assignment can be made. Under the law of our State an as-

signment of that kind cannot be made. I want to find out whether or not this commission will have authority to settle, in case the employee desires to have suit brought to recover damages?"

Mr. Gard:

"Yes; after assignment, I would say the commission would have the authority to prosecute the case, or settle it, in its discretion."

Mr. Van Dyke:

"That is what I wanted to know, whether the full power would be placed in the hands of the commission or not. . . ."

Mr. Cullep:

"In most jurisdictions a claim for personal injuries is not assignable."

Mr. Gard:

"That is very true."

Mr. Cullep:

"Now, are you creating such a right by statute here?"

Mr. Gard:

"Under this statute we are."

July 12, 1916—Passed House—P. 10915.

Remarks of Warren Gard, Chairman of Judiciary Committee reporting out bill—P. 1508—he wrote report 678.

SENATE

July 25, 1916—H. R. 15316 reported favorably by Committee on Education & Labor, with one amendment.

Report 733, Smith, chairman.

Debate mainly on amendments 12887—12092, passed August 19, 1916.

14158—Signed by President, September 8, 1916, after agreements on minor amendments.

House Report 678.

May 11, 1916.

P. 11 of Report: Mr. Gard:

"If the injury or death for which compensation is payable is caused by the negligence of some person other than the United States, the commission may require the beneficiary to assign to the United States any right of action he may have against such other person or to prosecute said action in his own name. If the commission realizes upon such cause of action, it shall, after deducting expenses and compensations already paid, pay any surplus to the beneficiary. If a beneficiary entitled to compensation pursues his right of action and realizes upon the same, he is required to credit upon compensations due from the United States the amount received from such other person."

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 620

BOEING AIRPLANE COMPANY, PETITIONER

v.

ARTHUR E. PERRY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES W. SULLIVAN, DECEASED; AND COLENE SULLIVAN, AS WIDOW OF JAMES W. SULLIVAN, DECEASED; AND CYNTHIA LYNN SULLIVAN, A MINOR, BY AND THROUGH COLENE SULLIVAN, HER MOTHER, AS NATURAL GUARDIAN AND NEXT FRIEND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The relevant facts are set forth in the petition and in the opinion of the court of appeals (Pet., App. A) and may be summarized briefly for purposes of this memorandum. The late Captain Sullivan, a member of the United States Air Force, was killed in the crash of a Boeing B–47 bomber. Thereafter, a wrongful death action was instituted against Boeing, the manufacturer of the plane, in the name of the special administrator of the decedent's estate. Concededly,

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this was in strict accordance with a Nebraska statute (Pet. 5–6) providing that such a suit shall be brought by and in the name of personal representatives of the decedent. By reason of diversity, the action was filed in the United States District Court.

When the suit was commenced, Captain Sullivan's widow, for whose benefit it was brought, was receiving payment under the Federal Employees' Compensation Act, 5 U.S.C. 751. Subsequently, the United States, pursuant to the same Act (5 U.S.C. 776, Pet. 4–5), required Mrs. Sullivan to assign her right, title and interest in the wrongful death claim to the United States.[1] Petitioner's sole contention is that, once the assignment was made, the action pending in the district court could no longer be prosecuted without the substitution or intervention of the United States. It argues in this connection that the purpose of 5 U.S.C. 776 is to confer the right of action upon the United States and that the government must therefore enter the litigation as the real party in interest.

We note at the outset that there is no conflict in this case between the United States and the special administrator. The United States has no objection to the former's continued representation of all beneficial interests involved. We point out additionally that petitioner makes no claim that it is prejudiced by the fact that the United States has failed to intervene. The consideration that the United States has an interest in the recovery, if any, does not affect Boeing's

[1] Under this provision, the beneficiary ultimately receives any amount which exceeds the compensation paid under the Federal Employees' Compensation Act.

ability to defend the charge of negligence in the same way that it would if the widow had the sole interest in the potential recovery.

Petitioner suggests, however, that the government's interests are not fully protected by the administrator. But surely the question whether the interests of the United States will be adequately protected without its active participation in the litigation is one for the government to decide, assuming that there is no legal obstacle to continuation of the suit in its present form. We have been advised by the Department of Labor that "The present case is being handled in the same manner as virtually every case has been handled since the enactment of the Federal Employees' Compensation Act in 1916. That is, the claim is being prosecuted by private attorneys in the name of the person entitled under the applicable substantive law, with the understanding that the United States is entitled to refund from any portion of the recovery which may be eventually realized by each compensation beneficiary as provided by Section 27 of the Act." In short, experience has convinced the United States that the administration of the Act is well served by the course it is pursuing.

We perceive no legal obstacle to continuation of the suit in its present form. Rule 17(a) of the Federal Rules of Civil Procedure provides, to be sure, that "Every action shall be prosecuted in the name of the real party in interest." It adds, however, that an executor or administrator "may sue in his own name without joining with him the party for whose benefit the action is brought." There is nothing in the Fed-

eral Employees' Compensation Act which appears to override this provision.

So far as the capacity of the administrator is concerned, Rule 17(b) declares that this "shall be determined by the law of the state in which the district court is held." Petitioner makes no claim that state law has been misinterpreted, and it would appear in any event that there is no reason for this Court to review the issue of state law involved.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JANUARY 1964.

U. S. GOVERNMENT PRINTING OFFICE 1964